Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 8, 1960. On November 16, 1960 United States Circuit Judge Morris A. Soper granted a stay of that Court's mandate pending an application to the United States Supreme Court for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Is 18 U.S.C.A. §1461, as amended in 1958, 72 Stat. 962, so vague and indefinite that it does not meet the due process requirement of the Fifth Amendment?

2. Are the petitioner's pictures, consisting of male nudes, obscene within the meaning *Roth* v. *United States*, 354 U. S. 476 (1957), and *One Inc.* v. *Olesen*, 355 U. S. 371 (1958)?

3. Did the Court of Appeals for the Fourth Circuit in holding that representations of the male nude appeal "to prurient interest" apply a standard of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957), and *One Inc.* v. *Olesen*, 355 U. S. 371 (1958)?

Constitutional and Statutory Provisions Involved

Fifth Amendment:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

18 U.S.C.A. §1461, as amended in 1958, 72 Stat. 962:

> "* * * Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. * * *"

Statement of the Case

The petitioner was indicted on ten counts charging violations of 18 U.S.C.A. §1461. Three counts, namely three, eight and ten, charged the mailing of obscene pictures. The rest alleged the mailing of circulars and catalogues.

The first four counts charged mailings prior to August 28, 1958, the date of the amendment of 18 U.S.C.A. §1461, 72 Stat. 962. The remaining six counts charged mailings after the effective date of the amendment of August 28, 1958.

A trial before United States District Judge Walter E. Hoffman and a jury resulted in a conviction on all ten counts. On May 17, 1960 Judge Hoffman fined the petitioner $200.00 on each count for a total fine of $2,000.00, but not to stand committed for nonpayment of the fine, and in addition sentenced him to five years imprisonment on each count,

the prison terms to run concurrently. The United States Court of Appeals for the Fourth Circuit affirmed on November 8, 1960.

The petitioner is a professional photographer (Tr. 61-62). He was born at Newport News, Virginia, and took his early schooling at George Witt High School and Hampton High School, where he graduated (Tr. 58-59). Shortly after graduation he went into the United States Marine Corps, where he served for 23 months from 1943 to 1945 (Tr. 59). After his service he first went into the ministry, and then into photography (Tr. 59-61). He attended the University of Kansas City, studying journalism and psychology (Tr. 60-61). While he was in college he was staff photographer for the yearbook (Tr. 60).

The petitioner regards photography as an art (Tr. 63). He feels that with the proper use of light and shadow he can do with a camera what a painter can do with his brush, or a sculptor with his mallets and chisels (Tr. 63-65).

The pictures which the petitioner is charged with mailing, are photographs which he himself has taken (Tr. 62). He believes that these pictures have artistic merit. He believes this so strongly that photography has become his business and profession.

It is also relevant to note that the petitioner intends his photographs only for artists, doctors, scientists, and the like professional people. He asks those who send for his pictures to sign a statement as to their occupation, so that he may know the use for which his pictures are designed (Tr. 62-63). It is submitted that the petitioner's malings are not obscene within the meaning of *Roth* v. *United States*, 354 U. S. 476 (1957) and *One Inc.* v. *Olesen*, 355 U. S. 371 (1958).

Reasons for Granting the Writ

I.

The Court of Appeals for the Fourth Circuit in holding that the 18 U.S.C.A. §1461, as amended in 1958, 72 Stat. 962, to be constitutional decided an important question of federal law which has not been, but should be, settled by this Court.

A.

The amendment of August 28, 1958, 72 Stat. 962, makes 18 U.S.C.A. §1461 so vague and indefinite that it does not meet the due process requirement of the Fifth Amendment.

All statutes must be reasonably definite. This is a general due process requirement for all legislation, whether federal or state, whether civil or criminal. Moreover the standards of certainty in statutes with criminal sanctions are more exacting than those with civil ones only. As the United States Supreme Court pointed out many years ago in *United States* v. *Reese*, 92 U. S. 214 (1876), through Chief Justice Waite: "... Every man should be able to know with certainty when he is committing a crime." At 220.

Or as the Court ruled more recently in *Winters* v. *New York*, 333 U. S. 507 (1948), reversing 294 N. Y. 545, 63 N. E. 2d 98 (1945), through Justice Reed:

> "... The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness,' ... There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. ..." At 515.

Or yet again as the Court ruled in *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939):

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. (Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 242, 243; Connally v. General Constr. Co. 269 U. S. 385, 391-393; A. B. Small Co. v. American Sugar Ref. Co., 267 U. S. 233, 239; United States v. L. Cohen Grocery Co., 255 U. S. 81, 89-92; Collins v. Kentucky, 234 U. S. 634, 638; International Harvester Co. v. Kentucky, 234 U. S. 216; Cf. People v. Belcastro, 536 Ill. 144; People v. Licavoli, 264 Mich. 643.) The applicable rule is stated in Connally v. General Constr. Co. 269 U. S. 385, 391, 70 L. ed. 322, 328, 46 S. Ct. 126: 'That the terms of the penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' "

There are many additional cases to the same effect: *Champlin Refining Co.* v. *Corporation Comm'n.*, 286 U. S. 210 (1932); *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Chie* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *Collins* v. *Kentucky*, 234 U. S. 634 (1914); *International Harvester Co.* v. *Ken-*

tucky, 234 U. S. 216 (1914); cf. *Watkins* v. *United States*, 354 U. S. 178 (1957); *United States* v. *Cardiff*, 344 U. S. 174 (1952); *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 Cornell L. Q. 195, 214-18 (1955); Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77, 85-86 (1948).

The 1958 Amendment to 18 U.S.C.A. 1461 makes the pertinent part read:

> "Whoever • • • knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed • • •".

That this language is vague and indefinite, is attested by the fact that the United States District Court for the Eastern District of Virginia, and the United States Court of Appeals for the Fourth Circuit, gave it different interpretations. The federal district judge suggested that the latter part of this language might "be intended to form a basis for prosecution of a 'straw man' to whom non-mailable matter may be addressed." The Court of Appeals for the Fourth Circuit, on the other hand, said that this language meant "the delivery of non-mailable matter to a place specified by the addressee". If these two Courts could not agree on the meaning of this language, it is submitted that the 1958 amendment is not sufficiently definite to meet the due process requirement of the Fifth Amendment.

B.

Moreover, "criminal statutes are to be strictly construed." *Yates* v. *United States*, 354 U. S. 298, 310 (1957).

A further circumstance bearing on the treatment to be accorded to 18 U.S.C.A. § 1461, as amended in 1958, is that penal laws are to be strictly construed. On this point Chief Justice Waite in the leading case of *United States* v. *Reese*, 92 U. S. 214, had this further observation:

> "This is a penal statute and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. • • •"

There are a multitude of cases to the same effect. For instance, in the recent case of *Yates* v. *United States*, 354 U. S. 298 (1957) this Court held that the word "organize" in the Smith Act referred "only to acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities, even though such acts may loosely be termed 'organizational.'" At 310.

Strictly speaking, 18 U.S.C.A. § 1461, as amended in 1958, no longer has any clearly ascertainable meaning.

II.

The Court of Appeals for the Fourth Circuit in affirming the instant judgment of conviction, and the United States District Court for the Eastern District of Virginia, in letting the instant case go to the jury, applied a standard of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957), and *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958).

A.

The Supreme Court's prurient interest test for obscenity is a very narrow one.

The Supreme Court's test for obscenity, as laid down in *Roth* v. *United States*, 354 U. S. 476 (1957) is a very narrow one. Only that material is obscene which deals with sex in a manner appealing to the prurient interest of the average person in the community. At 487, 489.

At the 1957 Term, the Court perused the nudist publications *Sunshine & Health* and *Sun Magazine*, and determined them to be not obscene. *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958), reversing 249 F. 2d 114 (D. C. Cir. 1957), affirming 128 F. Supp. 564 (D.D.C. 1955).

At the same term the United States Supreme Court took a similar approach with reference to the motion picture film "The Game of Love," *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35 (1957), reversing 244 F. 2d 432 (7th Cir.), affirming 139 F. Supp. 837 (D. N. D. Ill. 1956). The Supreme Court viewed the film, decided that it was not obscene, and reversed the court below.

At the same Term the Court also gave favorable rulings for individuals in two further cases. In one of these, *One Inc.* v. *Olesen*, 355 U. S. 371 (1958) reversing 241 F. 2d 772 9th Cir. 1957), the Court held a magazine called *One*, which was beamed at homosexuals, to be not obscene.

In a fourth case at the same Term, *Mounce* v. *United States*, 355 U. S. 180 (1957), vacating judgment in 247 F. 2d 148 (9th Cir. 1955), affirming *United States* v. *4200 Copies International Journal*, 134 F. Supp. 490 (D. E. D. Wash. 1955), which involved nudist periodicals as well as two publications which contained only reproductions of human nudes without any text at all, the Court after a confession of error by the Solicitor General, vacated the judgment of the court below and remanded the case to the district court for reconsideration in the light of the *Roth* case. The district judge had included in the standard of obscenity which he had applied that which "offends the sense of propriety, morality, and decency of" the average person of the community. The Court of Appeals for the Ninth Circuit had adopted the district court's standard. But the Supreme Court had laid down the prurient interest test. When this case returned to the district court, the judge held all the publications there involved, even those solely with pictures and without any text at all, to be not obscene. Civil No. 1286, D. E. D. Wash., August 15, 1958.

On the last day of the next term, June 30, 1959, the Court took similar action with reference to the film "Lady Chatterley's Lover," *Kingsley International Pictures Corp.* v. *Board of Regents*, 360 U. S. 684 (1959). All of the justices, except Mr. Justice Black, viewed the film.

In addition, it is interesting to note that at the last three terms the Court has not found anything to be obscene, whether it be nudist magazines, or motion picture films or a publication beamed at homosexuals. Also the Court has so far lifted the ban on every film to come to court. The list includes "The Miracle," *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952), reversing 303 N. Y. 242, 101 N. E. 2d 665 (1951); "The Moon Is Blue," *Hilmby Productions, Inc. v. Vaughan*, 350 U. S. 870 (1955), reversing 177 Kan. 728, 282 P. 2d 412; "The Game of Love," *Times Film Corp. v. City of Chicago*, 355 U. S. 35 (1957), reversing 244 F. 2d 432 (7th Cir. 1957), affirming 139 F. Supp. 837 (D. N. D. Ill. 1956); "La Ronde" (a picture made from Arthur Schintzler's Reigen), *Commercial Pictures Corp. v. Board of Regents*, 346 U. S. 587 (1954), reversing 350 N. Y. 336, 113 N. E. 2d 502 (1953); "Native Son" and "M," *Superior Films v. Dept. of Education*, 346 U. S. 587 (1954), reversing 159 Ohio St. 315, 112 N. E. 2d 311 (1953); "Pinky," *Gelling v. Texas*, 343 U. S. 960 (1952), reversing 157 Tex. Cr. 516, 247 S. W. 2d 95; and "Lady Chatterley's Lover" *Kingsley International Pictures Corp. v. Board of Regents*, 360 U. S. 684 (1959), reversing 4 N. Y. 2d 349, 175 N. Y. S. 2d 39 (1958), reversing 4 A. D. 2d 348, 165 N. Y. S. 2d 681 (3d Dept. 1957).

B.

In *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958), the Court recognized that representations of the human nude, without more, are not obscene.

Because of our long history with the human nude in various art forms, and more recently in numerous other forms, our courts have frequently stated that nudity per se

is not obscene. See *e.g. Parmelee v. United States*, 113 F. 2d 729, 732 (D. C. Cir. 1940); *Maryland State Board v. Times Film Corp.*, 212 Md. 454, 129 A. 2d 833, 838 (1957); *People v. Muller*, 96 N. Y. 408, 411 (1884); *People v. Gonzales*, 107 N. Y. S. 2d 968, 969 (1951); *Commonwealth v. Hueston*, The Legal Intelligencer, Oct. 26, 1956, 25 U. S. Law Week 2193, 2194 (1956).

Accordingly many cases have held that various portrayals of the human nude were not obscene. See *e.g. Parmelee v. United States*, 113 F. 2d 729 (D. C. Cir. 1940) (Parmelee's book, Nudism in Modern Life); *Sunshine Book Company v. Summerfield*, D. D. C. Civil Action No. 3007-53, July 13, 1953, affirmed 221 F. 2d 43 (1954), cert. denied, 349 U. S. 921 (1955) (numerous issues of the nudist periodicals *Sunshine & Health* and *Sun Magazine*); *State v. Lerner*, 51 Oh. L. Abs. 321, 81 N. E. 2d 282 (1958) (seven issues of the nudist periodical *Sunshine & Health*); *LeBaron v. Olesen*, 125 F. Supp. 53 (S. D. Cal. 1954) (Marilyn Monroe coasters); *In the Matter of Excelsior Pictures Corp. v. Regents*, 3 N. Y. 2d 237, 144 N. E. 2d 31 (1957), affirming 2 A. D. 2d 941, 156 N. Y. S. 2d 200 (1956) (nudist film *Garden of Eden*); *Matter of Capital Enterprises v. Regents*, 1 A. D. 2d 990, 149 N. Y. S. 2d 920 (1956) (motion picture *Mom and Dad*, depicting human birth); *Maryland State Board v. Times Film Corp.*, 212 Md. 454, 129 A. 2d 833 (1957) (film *Naked Amazon*, showing Camyura Indians in the jungles of Brazil, who live entirely unclothed); *American Museum of Natural History v. Keenan*, 20 N. J. Super. 111, 89 A. 2d 98 (1952) (film *Lgtuko*, which depicts the life of a nude African Tribe); *Commonwealth v. Hueston, The Legal Intelligencer*, Oct. 26, 1956, 26 U. S. L. Week 2193 (Photographs of the human nude).

The nudist film *Garden of Eden*, according to the Court of Appeals of New York, "has been shown in 36 States and in many foreign countries." *In the Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, 239, 144 N. E. 2d 31, 32 (1957).

Indeed in both the *Mounce* and the *Sunshine Book Company* cases the district courts observed that nudity *per se* was not obscene. In the *Mounce* case *sub nom. United States* v. *4200 Copies International Journal*, 134 F. Supp. 490 (D. E. D. Wash. 1955), the federal district judge stated: "Nudity is not per se obscene." At 493. In the *Sunshine Book Company* case the federal district judge said:

> "First and foremost, nudity is not obscene, per se." 128 F. Supp. 564, 569.

However, neither they nor the Courts of Appeals were able to follow through on these observations. Their errors in this regard the United States Supreme Court corrected, by vacating the judgment of the Court of Appeals for the Ninth Circuit, and by reversing the judgment of the Court of Appeals for the District of Columbia Circuit.

C.

The decisions holding nudity to be not obscene result from the fact that the human nude has been with us in art for more than twenty-five centuries and in many other forms more recently.

We have had representations of the human nude, both male and female, separately and together, in sculpture and painting for more than 2500 years. In this history the Greeks took the first steps. They produced monumental statues of naked youths beginning about the middle of the seventh century B.C. Since then we have had so many ex-

amples of the human nude in sculpture and painting that they are too numerous to mention. Human nudes in sculpture, painting and other forms are on exhibition in various museums throughout the country. They have been produced in such widely disseminated publications as the *Encyclopaedia Britannica*, *Time*, *Life* and in numerous books on art.

The latest edition of the Encyclopaedia Britannica (1952) in its articles on *Sculpture* and *Sculpture Technique* contains reproductions of Michelangelo's *Slave*, vol. 20, Plate VII, opp. p. 230; and *Evening*, Plate X, Roden's *The Kiss*, Plate VII, opp. p. 198, and *The Bronze Age*, Plate X, opp. p. 230, Donatello's *David*, Plate IV, opp. p. 198, Arthur Lee's *Dawn*, Plate XVII, and *Rhythm*, Plate XI, opp. p. 230, and Maillol's *Torso*, Plate XII. In its article on painting this work contains reproductions of Botticelli's *The Birth of Venus*, vol. 17, Plate VI, Correggio's *Mercury Instructing Cupid before Venus*, Plate VIII, Rubens' *Venus and Adonis*, Plate X, and Titian's *Woman on a Couch*, Plate VIII. The earlier edition of this work in its articles on *Sculpture* and *Sculpture Technique* carries additionally Michelangelo's *Evening*, vol. 20, Plate V, opp. p. 224, Maillol's *Danae*, Plate XIX, opp. pp. 216-217, and Rodin's *Eternal Springtime*, Plate VIII, opp. 226-227 (15th ed. 1937). This edition on painting also shows one of Matisse's *Odalisques*, vol. 17, Plate XVI.

Life magazine reproduced Michelangelo's *The Creation of Man*, Dec. 26, 1959, pp. 25-48, Botticelli's *The Birth of Venus*, Velasquez's *Lounging Venus*, Correggio's *Awakened Danae*, Manet's *Unblushing Olympia*, Titian's *Bathing Goddess*, Rubens' *Three Graces*, Courbet's *Realist Bather*, Renoir's nude painting of his wife, and a nude piece of sculpture by Praxiteles, Oct. 22, 1956, pp. 102-111.

Time reproduced a picture of Michelangelo's statue *David*, March 4, 1946, p. 99; Tintoretto's *Minerva Pursuing Venus*, June 11, 1956, p. 85; and Lucus Cranach's *Adam and Eve*, April 23, 1956, p. 87.

Reference may also be made to some of the numerous recent works on art containing reproductions of the human nude. See *e.g.* Kenneth Clark, *The Nudes A Study In Ideal Form* (1953); R. Lulies and M. Hirmer, *Greek Sculpture* (Michael Bullock transl. 1957); O'Malley and Sanders, *Leonardo da Vinci on the Human Body* (1952); Rodin (Phaidon 1951); Goldschneider, *The Sculptures of Michelangelo* (2d ed. 1950); Goldschneider, *The Paintings of Michelangelo* (2d ed. 1948); Martinie, *Rodin* (1947).

More recently representations of nude human figures have occurred in other fields than sculpture and painting. Such representations, of both male and female figures, have come to be used pretty freely in almost any field, and to illustrate almost any text. They are used in etching and photography. They are used in medical treatises and journals. They are used in text books and periodicals. They are used in various works giving sexual instructions and advice.

Almost two decades ago the court in *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940) thus summarized the situation at that time.

> "Nudity in art has long been recognized as the reverse of obscene. Art galleries, and art catalogues contain many nudes, ancient and modern. Even such a conservative source book as the Encyclopaedia Britannica, contains nudes, full front view, male and

female, and nude males and females pictures together and in physical contact.

"The use of nude figures and photographs in medical treatises and textbooks is also commonly practiced today. * * *" At 734.

Representations of the human nude have increased still more since the time of that opinion. Indeed they have increased substantially. Various of the publications we have cited attest to this fact. So do numerous other events. Such a tightly self-censored group as the movie industry, in the December 11, 1956 revision of its Production Code, permitted the filming of nude infants. The magazine *Variety*, in its October 7, 1957 issue had a front page story about a nudist colony on commercial television in Great Britain. The article tells us "the femme members of the Colony wore big smiles, little earrings—and that's all." In the same month there were two art exhibits in New York City featuring the human nude. One of these showed the nudes of Nicholas Marsicano; the other presented a survey of nudes including works of Renoir, Titian, Picasso, Chagall, Tiepolo, Giacometti, Maillol, Boucher, and Schaffner, N. Y. Times, Oct. 22, 1957, p. 30; 2-3; N. Y. Times, Oct. 30, 1957, p. 23-; 2-3. Of the later exhibit art critic Dore Ashton wrote in The New York Times:

"In 'Nudes Through the Ages' at the Delius Gallery, 24 East Sixty-seventh Street, visitors will see that the human body has been a faithful muse, always presenting new possibilities for expression to the attentive and passionate artist.

"The nude creates a division in art history of its own, a 'subject' classification that offers ideal cir-

cumstance for comparative appraisal. There have always been artists, it appears, who thought of the nude as an interesting form, no more no less. In the early Renaissance, those artists made routine cross-hatch studies in which they expressed only the rationalized volumes of muscle and bone and little else. In more recent periods, artists interested solely in inanimate metaphors such as the hackneyed female nude—equals—violin.

"These formal drawings prove a minor order when cast together with works by artists who have seen in the nude an inexhaustible symbol of life—of all life, that is . . ." October 30, 1957, p. 23, col. 2.

Yet more recently one of England's leading newspapers prominently displayed the picture of a nude woman taken beside a park statue. Truly the human nude has come to be culturally and judicially accepted as one of the ordinary facts of life.

III.

The Court of Appeals for the Fourth Circuit in ruling that the male nude appeals to prurient interest applied a standard of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957); *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958); and *One Inc.* v. *Olesen*, 355 U. S. 371 (1958).

The test for obscenity is not simply that which appeals to the prurient interest but rather that which appeals to the prurient interest of the average person in the community. Representations of the male nude do not appeal to the prurient interest of the average person in the community. That is why society has been a little freer in permitting representations of the male nude than of the female nude. If representations of the male nude appeal to the prurient interest of anybody, it is to the prurient interest of homosexuals. Such persons do not fall within the characterization of the average person of the community.

So in *One Inc.* v. *Olesen*, 355 U. S. 371 (1958), reversing 241 F. 2d 772 (9th Cir. 1957), the Supreme Court specifically held that material beamed at homosexuals was not obscene. The magazine in question, called *One*, contained stories about a lesbian's influence on a young girl, described alleged homosexual activities of British peers and had an article about other magazines containing similar material. The Court of Appeals for the Ninth Circuit held the material to be obscene. However, the Supreme Court reversed.

CONCLUSION

Since the Court of Appeals for the Fourth Circuit decided an important question of federal law which has not been but which should be settled by this Court, namely that 18 U.S.C. 1461 as amended on August 28, 1958, 72 Stat. 962, did not violate the due process clause of the Fifth Amendment; and since the Court of Appeals for the Fourth Circuit applied a standard of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957); *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958); and *One Inc.* v. *Olesen*, 355 U. S. 371 (1958), this petition for a writ of certiorari should be granted.

Respectfully submitted.

O. John Rogge
Attorney for Petitioner
401 Broadway
New York 13, New York
WOrth 6-1800

Reid M. Spencer
Attorney for Petitioner
Board of Trade Building
Norfolk 10, Virginia
MAdison 7-4566

APPENDIX I

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8128.

FRANK L. COLLIER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued October 3, 1960. Decided November 8, 1960.)

Before SOPER and BOREMAN, Circuit Judges, and LEWIS, District Judge.

Reid M. Spencer and O. John Rogge for Appellant, and Cary L. Branch, Assistant United States Attorney, (Joseph S. Bambacus, United States Attorney, and Shanley Keeter, Assistant United States Attorney, on brief) for Appellee.

Appendix I—Opinion of the United States Court of Appeals

SOPER, Circuit Judge:

This appeal is taken from a judgment of the District Court based on the verdict of a jury whereby the defendant was found guilty under ten counts of the indictment of mailing circulars or advertisements giving information where obscene pictures might be obtained and also with mailing pictures of this character in violation of 18 U.S.C. 1461. The sentence of the court was that on each of the ten counts of the indictment the defendant pay a fine of $200 and be imprisoned for a period of five years, the sentences of confinement to run concurrently and the fines to be cumulative.*

The first four counts of the indictment charged offenses committed on diverse dates in 1958 before the statute was amended by the act of August 28, 1958, 72 Stat. 962, while the offenses charged in the remaining counts of the indictment were committed after the amendment. By the statute as it stood prior to the amendment it was declared, amongst other things, that every obscene, lewd or lascivious book or picture and every circular or advertisement giving information where or from whom any such pictures or things might be obtained was nonmailable matter that should not be conveyed in the mails or delivered from any post office

* On January 10, 1958 the defendant was convicted in the Court of Sessions of Erie County, Pennsylvania, of violating a state statute by making and selling obscene photographs of the kind in evidence in this case and was placed on probation for twenty-three and a half months and forbidden to conduct and carry on the business of photography in Erie County during the period of probation. In the pending case the defendant testified that in Norfolk, Virginia, he filled seventy-five to a hundred orders for photographs per week at prices ranging form $5 to $10.

or by letter carrier; and it was provided that whoever deposited for mailing or delivery anything declared by the statute to be nonmailable should be fined not more than $5000 or imprisoned not more than five years or both. By the statute as amended it was likewise declared that obscene, lewd or lascivious articles or things as well as letters or circulars giving information as to where such matter could be obtained were nonmailable, and it was provided that whoever uses the mails for the mailing of such matter "or knowingly causes to be delivered by mail according to the direction thereon or *at the place at which it is directed to be delivered by the person to whom it is addressed*" shall be fined not more than $5000 or imprisoned no more than five years or both for the first offense and not more than $10,000 or imprisoned not more than ten years or both for each such subsequent offense.

The first contention of the appellant is that the statute as amended in 1958 is unconstitutional because it is so vague and indefinite that it does not meet the due process requirement of the Fifth Amendment or the provision of the Sixth Amendment which entitles an accused to be informed of the nature and cause of the accusation against him. The argument is based upon the alternative clause in the statute italicized above whereby it is made an offense for anyone knowingly to cause to be delivered by mail any nonmailable matter "at the place at which it is directed to be delivered by the person to whom it is addressed." It is argued that this language is not only vague and indefinite but is so obscure as to be meaningless. It seems to us that the quoted language means the delivery of nonmailable

matter to a place specified by the addressee; but for our purposes the interpretation of the phrase is immaterial because none of the counts in the indictment is based upon this language but is in every instance confined to the charge that the defendant used the mails for the delivery of circulars or advertisements giving information as to where obscene pictures might be obtained or used the mails for the delivery of such pictures. The inclusion of an obscure or meaningless phrase in a criminal statute does not invalidate the whole enactment or require the reversal of a conviction based upon an independent provision of the statute which has no connection with the questionable phrase. *Berea College v. Kentucky*, 211 U. S. 45; *McMullen v. Sperry*, 9 Cir., 144 F. 2d 703; 50 Am. Jur., *Statutes*, 474.

The defendant's principal contention is that the pictures referred to in the indictment are not obscene within the meaning of the statute as interpreted in the decisions of the Supreme Court of the United States. Of these the most pertinent is *Roth v. United States*, 354 U. S. 476, wherein the Court upheld a conviction for mailing obscene circulars and advertisements and an obscene book, and defined the meaning of obscenity (page 487). It is said that sex and obscenity are not synonymous and that obscene material is material which deals with sex in a manner appealing to prurient interests, that is, material having a tendency to excite lustful thoughts. The Court rejected an earlier standard of obscenity which allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons and in its place approved the standard of later decisions, that is, whether to the average person, applying contemporary community standards, the dominant

thence of the material taken as a whole appeals to prurient interest (page 489). The Court specifically approved the charge of the trial judge wherein the jury were warned that the test is not the effect of the material upon a particular segment of the community, but the impact of the material, considered as a whole in its entire context and not in the isolated portions, upon the average person in the community; and the jury were told that they were the exclusive judges of what offends the common conscience of the community.

The District Judge in the pending case incorporated this definition and these instructions almost word for word in his charge to the jury; and since the pictures mailed by the defendant differed somewhat in character he gave the additional instruction that a person who mails a picture or pictures obviously obscene does not escape the condemnation of the statute by placing them in a package with other pictures not obscene.* At the conclusion of this charge the defendant's attorney, in answer to an inquiry from the bench, stated that he had no objection to the instructions.

The jury convicted the defendant on all counts and hence the question for decision on this branch of the case is whether, as the defendant contends, the pictures were so clearly unobjectionable, in the light of subsequent decisions of the Supreme Court, as to leave no issue for submission to the jury. Three packets of pictures were mailed separately by the defendant on July 5, November 1, and November 19, 1958, respectively. Each packet contained a number of

* In the packet mailed July 5, 1958, a few pictures of male men were enclosed that were not clearly obscene.

photographs of nude young men so posed as to be devoid of any artistic appeal but obviously designed to depict an indecent exposure of the person. They were clearly of such a character as to require their submission to the jury under the instructions outlined above.

The defendant refers particularly to *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372, *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35, and *One Inc.* v. *Olesen*, 355 U. S. 371, in each of which the judgments of the lower courts that certain material was obscene were brought up on writ of certiorari and reversed without argument, but with citation of *Roth* v. *United States* or *Alberts* v. *California*, which was considered together with Roth in one opinion. Obviously Roth and Alberts were not overruled in the later decisions, whatever else they decided. Since no opinion was filed in these cases we have no precise guide to the reasons which actuated the Supreme Court other than the reasonable inference that the lower courts had not correctly applied the rule laid down in Roth. Examination of the opinions of the lower courts shows plainly that portions of the materials were obscene in the judgment of intelligent and able men experienced in the finding and appraisal of fact, and the reversal of their conclusions is explicable to us only on the theory that they paid insufficient regard to the rule that in judging accused material attention should be directed not to detached and separate portions but to the whole material in its entire context. The material found by the trial and appellate courts to be obscene in each of these cases was only part of a publication devoted to the promotion or discussion of a particular idea such as the

cult of nudism in the Sunshine case, or the subject of homosexuality in *One Inc.* v. *Oleson;* or the material consisted of the adaptation of a book for moving pictures which disclosed illicit sexual relationships incident to the development of the plot, or the illustration of a thesis that the writer desired to expound as in *Times Film Corp.* v. *City of Chicago, supra.*

We are not convinced, as the defendant contends, that under the modern rule no portrayal of the human form can be obscene. On the contrary, we are in accord with the following comment of Judge van Pelt Bryan on *Sunshine Book Company* in *Poss* v. *Christenberry*, D. C., S. D. N. Y., 179 F. Supp. 411, 416, where he said:

> "Plaintiff's argument that the per curiam decision of the Supreme Court in *Sunshine Book Co.* v. *Summerfield* compels a holding that the circular now before me is not obscene is specious. The same argument was raised and rejected in Glanzman. It is plain that the Supreme Court in the Sunshine Book case did not give blanket approval to all material containing nude photographs. It held only that the magazine there under consideration published by a bona fide group devoted to the cult of nudism, and containing pictures of nudists in the nude, was not obscene. There was no question of the sincerity of purpose of the publishers and the objective of the photographs and text was not an appeal to prurient interest."

The defendant makes the additional contention that the pictures in this case do not offend the statute because the human nude has been the subject of legitimate portrayal

in sculpture, painting and other forms of art for many years. See *Parmelee* v. *United States*, C. A., D. C., 113 F. 2d 729. There is nothing, however, in the pictures in the case before us to suggest that they were designed for artistic appreciation or composed to promote or illustrate any particular thesis or idea, and no factual discussion is presented to us to support the argument.

The final contention of the defendant that the male as distinguished from the female figure cannot be so portrayed as to appeal to prurient interest is not worthy of discussion.

Affirmed.

APPENDIX II

Opinion of the United States District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Cr. No. 11,889

UNITED STATES OF AMERICA

—v.—

FRANK L. COLLIER

Cr. No. 11,892

UNITED STATES OF AMERICA

—v.—

JOHN MICHALOS alias JOHNNY CONCHO; ROBERT PIKE, alias BOB MERCURY

MEMORANDUM

Defendants, in identical motions, seek the dismissal of indictments charging them with violations of the obscene

mail statute, 18 U. S. C. §1461, as amended in 1958. So far as it may be pertinent, the statute reads:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "*Whoever* knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or *knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed*, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined . . . , or imprisoned . . . , or both, . . ."

Defendants urged that the statute as a whole violates the First and Tenth Amendments to the Constitution of the United States, and that the 1958 Amendment to §1461 contravenes the Fifth and Sixth Amendments.

In the indictment against Frank L. Collier, the first four counts relate to alleged offenses occurring prior to the effective date of the 1958 Amendment and follow the wording of the former statute. The last six counts pertain to alleged offenses occurring subsequent to the effective date of the 1956 Amendment. The six counts against Micholas and Pike relate to offenses allegedly committed after the 1958 Amendment.

Appendix II—Opinion of the United States District Court

In *Roth* v. *United States*, 354 U. S. 476, it was held that "obscenity is not within the area of constitutionally protected speech or press". Issues raised in *Roth* involved the First, Fifth, Ninth, Tenth and Fourteenth Amendments; all of which were resolved against the defendants. We need not discuss the matter further.

We turn to the effect of the 1958 Amendment, enacted subsequent to *Roth*, and the point urged by defendants that the amendment to §1461 makes it so vague and indefinite as to violate the due process clause of the Fifth Amendment and the provisions of the Sixth Amendment which entitles an accused to be informed of the nature and cause of the accusation.

It is said that the purpose of the 1958 Amendment was to provide for continuing offenses by the use of the mails, rather than by deposits for mailing, and for punishment for subsequent offenses. In short, the crime now lies in the "use" of the mails by the offender, and the requisite proof of "depositing" is no longer required.

Defendants contend that the amended statute is so ambiguous with respect to the words "or at the place at which it is directed to be delivered by the person to whom it is addressed" that it is offensive to the Sixth Amendment. The counts in each indictment do not contain this specific language but merely charge that the defendants "did knowingly use the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by the mail, according to the direction thereon". As the alleged ambiguous language is not a factor in these cases, the point raised by defendants becomes immaterial.

Assuming arguendo that the wording of the amended statute is pertinent, it is not, in the opinion of this Court, contrary to the requirements of the Sixth Amendment. The words "or at the place at which it is directed to be delivered by the person to whom it is addressed" may be intended to form a basis for prosecution of a "straw man" to whom nonmailable matter may be addressed. It provides jurisdiction in the use of the mails at the source and at the place of delivery. We do not believe that the language is offensive to the Constitution.

WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
April 20, 1960

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Office-Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

No. 571

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRANK L. COLLIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

WILLIAM E. FOLEY,
Acting Assistant Attorney General,

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys,
Department of Justice,
Washington 25, D. C.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 27-33;[1] Pet. App. I) is reported at 283 F. 2d 780. The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. II) is reported at 183 F. Supp. 47.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1960 (R. 35). The petition for a

[1] "R." designates the printed record on file with this Court. "T." denotes the trial transcript filed herewith.

writ of certiorari was filed on December 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's claim of statutory vagueness is posed by this case in which no count of the indictment was based upon the allegedly indefinite language of 18 U.S.C. 1461.

2. Whether the distribution through the mails of the pictures involved was so clearly not in violation of the obscenity law that the trial court should not have allowed the case to go to the jury.

STATUTE INVOLVED

18 U.S.C. 1461, as amended in 1958, 72 Stat. 962, provides in pertinent part:

> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

STATEMENT

Following a jury trial held in the United States District Court for the Eastern District of Virginia,

the petitioner was convicted on each count of a ten-count indictment, charging that the petitioner knowingly distributed obscene pictures through the mails (counts 3, 8, 10) and circulars and advertisements (counts 1, 2, 4, 5-7, 9), giving information as to where and how obscene material might be obtained (R. 20; T. 170, 178, 186-187), in violation of 18 U.S.C. 1461. The petitioner was sentenced to 5 years' imprisonment on each count to run concurrently, and to pay a total fine of $2,000—$200 on each count (R. 22, T. 192). The court of appeals unanimously affirmed the conviction (R. 27-33).

1. The pertinent evidence reveals that the petitioner conducted a mail-order business in Norfolk, Virginia, soliciting orders for, and distributing, photographs through the mails. The photographs which were the subject of the indictment were ordinary glossy pictures of nude males, which as originally mailed by petitioner had an ink patch over the genital organs of the models. The ink was easily removable by the application of a damp cloth without any damage to the photographs (T. 7-13, 14-15, 25-27). The ink was removed from several of these photographs upon receipt, by the postal inspector who had placed orders with the petitioner under fictitious names (T. 13-27, 33-34).[2]

---

[2] These photographs were introduced as government exhibits 3A-3Z; 6A-6F; 9-9D. These, as well as the other government exhibits, including, *inter alia*, circulars and advertisements sent out by the petitioner to prospective purchasers, are on file with the Clerk of this Court. Also on file are numerous exhibits introduced by the petitioner to show contemporary community standards.

The petitioner testified that he filled from seventy-five to one hundred orders a week, at an average charge of $5 to $10 per order (T. 96). Counsel stipulated that the items charged to be obscene were mailed by the petitioner from the place shown by the postmark on each particular envelope (Norfolk, Virginia) (T. 52-55).

2. The trial judge charged the jury on the standard it was to apply in determining obscenity as follows (T. 172-174):

> We start, gentlemen, with the premise that nudity in and of itself, is not obscene. Mere sexual immorality does not necessarily constitute obscenity or pornography. Pictures may advocate an idea of sexual immorality which may not be proper behavior, but would not, standing alone, be obscene or pornographic.
>
> * * * The portrayal of sex in art, literature and scientific works is not, in itself, obscene matter. * * *
>
> The test to apply is not judged by the effect of such material allegedly obscene upon particularly susceptible persons. You, as jurors, must determine whether the Government has proved beyond a reasonable doubt that to an average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. * * *
>
> * * * the test is not whether it would [arouse] sexual desires or sexual impure thoughts in those comprising a particular segment of the community, such as the young, the immature or the highly prudish, or would leave another segment, such

> as the scientific or highly educated, or the so-called worldly-wise and sophisticated indifferent and unmoved. The test in each case is the effect of the pictures, circulars or pamphlets, considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words you determine its impact upon the average person in the community. * * *

Defense counsel took no exceptions to the charge (T. 185).

ARGUMENT

The petitioner argues (1) that 18 U.S.C. 1461, as amended in 1958, is unconstitutionally vague (Pet. 5-8), and (2) that the photographs mailed by petitioner in this case are not obscene within the standard adopted by this Court in *Roth* v. *United States*, 354 U.S. 476 (Pet. 9-17). Neither argument justifies review.

1. The petitioner's constitutional argument is not, in reality, posed by this case. The plain purpose of the allegedly indefinite language of the 1958 amendment to 18 U.S.C. 1461—"Whoever * * * knowingly causes [non-mailable matter] to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed * * *"—was to make a violation of 18 U.S.C. 1461 a continuing offense, permitting indictment and trial not only where the mailing occurred (as provided in the pre-1958 statute) but also at the place of delivery. See Conf. Rept. No. 2624, 85th Cong., 2d Sess.; S. Rept. No. 1839, 85th Cong.,

2d Sess.[3] But in this case petitioner was tried in Norfolk, Virginia, the place from which he mailed the allegedly obscene material, and whether or not it was the place where "it [was] directed to be delivered * * *." Hence, as the court below pointed out, "for our purposes the interpretation of the phrase is immaterial because none of the counts in the indictment is based upon this language * * *" (Pet. App. 4a). The constitutionality of 18 U.S.C. 1461, as it was before the 1958 amendment, was upheld against a claim of vagueness in *Roth* v. *United States*, 354 U.S. 476, 490-491.

2. Petitioner argues that the decisions below apply a standard of obscenity in conflict with the decisions of this Court in *Roth* v. *United States*, 354 U.S. 476, and *Sunshine Book Co.* v. *Summerfield* 355 U.S. 372. There is no conflict. Neither of the courts below held that pictures of nudes were obscene *per se*. The trial court explicitly charged the jury, *supra*, p. 4—

> We start, gentlemen, with the premise that nudity in and of itself, is not obscene. * * *

The court then left it to the jury to decide, *supra*, p. 4—

> whether the Government has proved beyond a reasonable doubt that to an average person, ap-

---

[3] The amendatory language was specifically aimed at overcoming the decision of the Tenth Circuit in *United States* v. *Ross*, 205 F. 2d 619, 621, where it was held that an indictment charging the deposit for mailing of obscene photographs in California for delivery in Kansas, was not triable in the district court in Kansas (the place of delivery) since, the court held, 18 U.S.C. 1461, as it then read, made it a crime to deposit objectionable matter for mailing, "and not a use of the mails which may follow such a deposit."

> plying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. • • •

Other portions of the charge defined prurient interest in accordance with *Roth* v. *United States*. The court of appeals proceeded upon the same legal theory.

Petitioner's argument therefore comes down to the contention that there was not sufficient evidence to permit a jury to find that the pictures appealed to prurient interest. Although the case is closer on this point than others to come before the courts and more direct evidence bearing upon the objectives of the accused might be desired, nevertheless we think that the evidence was sufficient. The jury could conclude that the pictures themselves were obviously designed to emphasize the genital area. The contrast between these poorly posed photographs and the studies of the human body and works of art which petitioner put into evidence tends strongly to support the verdict. Marking the prints with washable ink and advertising them as "hand-draped," a term well understood by persons trafficking in obscene photographs, also supports the adverse inference. And the jury could take into account the price charged—$10.00 a packet—as well as the petitioner's false pretense that he limited his sales to adults with a legitimate interest in nude photography. In any event, the question is one of fact not deserving review by this Court.

Nothing to the contrary was decided in *Sunshine Book Co.* v. *Summerfield*. As the court below recognized, the nude photographs which the lower courts had erroneously held to be obscene in *Sunshine Book*

were "only part of a publication devoted to the promotion or discussion of a particular idea such as the cult of nudism * * *" (Pet. 6a-7a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM E. FOLEY,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

FEBRUARY 1961.

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